80-1283

Office-Supreme Court, U.S.
FILED
JAN 29 1981
ALEXANDER L. STEVAS, CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

HAROLD THORNTON,

Petitioner,

V.

STATE OF ALABAMA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

Submitted by:
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I. QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE ACCUSED IN A CRIMINAL PROCEEDING IS ENTITLED TO HAVE A SEARCH WARRANT QUASHED AND THE EVIDENCE SEIZED EXCLUDED FROM HIS TRIAL IN A CASE WHERE THE POLICE AFFIANT'S TESTIMONY AND AFFIDAVIT IN SUPPORT OF THE CHALLENGED SEARCH WARRANT CONTAIN INCONSISTENT AND CONTRADICTORY STATEMENTS CONCERNING THE VERACITY OF THE POLICE INFORMANT REFERRED TO IN THE SUPPORTING AFFIDAVIT?

B. WHETHER THE ACCUSED IN A CRIMINAL PROCEEDING INVOLVING DRUG CHARGES IS ENTITLED TO HAVE THE STATE DISCLOSE THE IDENTITY OF A POLICE INFORMANT IN A CASE WHERE THE ACCUSED CLAIMS AS PART OF HIS DEFENSE THAT THE INFORMANT PLANTED THE DRUGS IN HIS RESIDENCE WHICH LEAD TO THE CRIMINAL CHARGES AGAINST THE ACCUSED?

II. PARTIES TO THE PROCEEDING

The parties to this proceeding are petitioner Harold Thornton and respondent State of Alabama.

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V. OPINIONS BELOW

The December 2, 1980 judgment of the Alabama Supreme Court which petitioner seeks to have this Court review is not reported. The judgment, entered in Harold Thornton v. State of Alabama, Ala.Sup.Ct. No. 79-841, is attached hereto as Appendix A.

The June 30, 1980 opinion of the Alabama Court of Criminal Appeals affirming petitioner's criminal conviction on illegal drug possession charges is not reported. The opinion, cited as Harold Thornton v. State, 3 Div. 135, is attached hereto as Appendix B.

VI. JURISDICTION

The judgment sought to be reviewed by this Court is the December 2, 1980 order of the Alabama Supreme Court. The Order denied

petitioner's Petition For Writ Of Certiorari filed in the Alabama Supreme Court seeking review of the Alabama Court of Criminal Appeal's June 30, 1980 opinion in Harold Thornton v. State, supra.

This Court has jurisdiction of this petition under 28 U.S.C. §1257(3).

VII. CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

VIII. STATEMENT OF THE CASE

On December 2, 1978, various members of the Montgomery, Alabama Police Department entered petitioner's residence in the City of Montgomery, Alabama, pursuant to a search warrant that was issued by a municipal court judge on December 1, 1978. At that time, the police seized a quantity of drugs and other items of personal property, which were subsequently introduced at trial over petitioner's objection.

The search warrant used in connection with the search of petitioner's residence was supported by the following affidavit:

STATE OF ALABAMA)
CITY OF MONTGOMERY)
MONTGOMERY COUNTY) AFFIDAVIT IN SUPPORT OF A DAYTIME SEARCH WARRANT

Before me, the Honorable Matthis W. Piel, Judge of the Municipal Court of the City of Montgomery, Alabama, the undersigned being first duly sworn, deposes and says:

That he is a police officer in and for the City of Montgomery, Montgomery, Alabama, and that he has reason to believe, probable cause to believe, and, in fact, does believe, that marijuana, a controlled substance, or any compound, mixture of substance containing marijuana, or heroin, cocaine or dilaudid is being kept, stored and concealed in the residence located at 455 "A" Lanier Court, Montgomery, Alabama. This is in violation of the Alabama Uniform Controlled Substance Act of 1971.

And the facts tending to establish the foregoing grounds for issuance of a daytime search warrant are as follows:

On November 29, 1978, I had a conversation with a confidential and reliable informant who has given me information in the past which has proven to be true and correct. (Emphasis added.) Informant has also furnished information in the past to Sergeant E. B.

Alford of the Montgomery Police Department as well as Sergeant T. Hudman which has proven to be true and correct and has led to warrants and correct identification of a subject by the name of R. T. Fuller who robbed the Thoni Gas Station located at 4232 Mobile Highway during the past year. Said informant informed me that within the past twelve hours informant, hereinafter known as "A", was present at the residence located at 455 "A" Lanier Court, Montgomery, Alabama at which Harold Thornton resides and at that time observed quantities of heroin and cocaine being cut up for distribution. "A" further stated that there were quantities of dilaudid at that residence.

Based on the above information, I have probable cause to believe, and do believe, there is presently located at 455 "A" Lanier Court, Montgomery, Alabama where Harold Thornton resides, a quantity of marijuana, cocaine, heroin and dilaudid, all of which are controlled substances.

This affidavit is being made for the purpose of securing a daytime search warrant for the residence located at 455 "A" Lanier Court, Montgomery, Alabama.

SWORN TO BEFORE ME THIS THE 1ST DAY OF DECEMBER, 1978.

/s/J. G. Laing
J. G. Laing, Detective

/s/ Matthis W. Piel
Municipal Court Judge

The aforementioned affidavit was prepared by former officer John Laing[1] of the Montgomery Police Department. (R. 101). Judge Matthis Piel signed the search warrant based solely on the information presented in the affidavit. (R. 5-7). There was no discussion between Laing and Piel concerning the contents of the affidavit. (R. 7).

The lead in this case came solely from the informant referred to in Laing's affidavit. (R. 101).

---

[1]This Court can take judicial notice that officer Laing was convicted of the sell of drugs on July 12, 1979 and sentenced on July 27, 1979 by the Montgomery County Circuit Court. This matter was touched upon during a May 14, 1979 motion to suppress hearing. (R. 23-24). Laing's conviction was upheld by the Alabama Court of Criminal Appeals in John G. Laing v. State, 3 Div. 143 (Oct. 7, 1980), rehearing denied (Oct. 28, 1980).

When the search was executed at 7:00 a.m. by the various law officers, there were only two persons at the residence, petitioner and his nephew. (R. 170).

Petitioner was in his bathroom when the officers arrived, and his nephew allowed them to enter the residence. (R. 171). The officers came into the residence bearing shotguns and pistols, advised petitioner and his nephew that they were there to search the house, and proceeded to search the various rooms. (R. 171, R. 172). The officers told the petitioner that they had found illegal drugs on the premises and placed him and his nephew under arrest. (R. 172).

Petitioner was subsequently indicted by the Grand Jury of Montgomery County, Alabama on the following three (3) counts: Count I, possession of heroin; Count II,

possession of cocaine; and Count III, possession of codeine. (R. 251).

Petitioner waived arraignment and plead not guilty and not guilty by reason of insanity.

On April 20, 1979, petitioner filed a motion to quash the search warrant executed in connection with his arrest (R. 254-256) and a motion to suppress the evidence seized. (R. 257-259). On May 14, 1979, the trial court conducted a hearing on petitioner's aforementioned motions (R. 3-24) and denied them at the conclusion of the hearing.

Petitioner stood trial on May 14. 1979, and his case was declared a mistrial on May 15, 1979.

One June 11, 1979, petitioner, by and through new counsel, filed a motion to controvert the search warrant, suppress the evidence, and produce the informant used

by police in his case. (R. 260-264). Petitioner cited previous decisions of this Court in support of the motion. Following a hearing on this motion on June 15, 1979, the trial court denied this motion. (R. 265). During the motion hearing, the Court precluded examination by petitioner's counsel of questions seeking the identity of the police informant because the Court did not want to go "...into things that have already been heard." (R. 31). The Court stated, "I'm not going to give you any more than you have already been granted by a previous hearing, and if this is for the purpose of getting the identity of the informer, I am not permitting it." (R. 31).

A review of the first motion hearing reveals that the Court was in error regarding the scope of the first motion hearing. (R. 3-24). Questions seeking the identity

of the informant were not asked at that hearing. (R. 3-24).

Petitioner renewed his June 11, 1979 motion at his trial. (R. 55).

On June 27, 1979, petitioner was retried for the same offenses and found guilty of all three counts. He was thereupon fined $25,000 on each count and sentenced on July 11, 1979 to ten (10) years in the penitentiary for each count, said sentences to run concurrently. (R. 268).

The trial Court subsequently denied petitioner's motion for new trial which alleged, inter alia, that the Court erred in denying petitioner's previous motions to suppress the evidence and disclose the identity of the police informant. (R. 270-271).

Petitioner timely appealed his conviction, fine and sentence to the Alabama

Court of Criminal Appeals. One June 30, 1980, the Court of Criminal Appeals affirmed petitioner's conviction. An application for rehearing was filed on July 14, 1980 and overruled on July 29, 1980.

Petitioner sought a review of the Court of Criminal Appeals June 30, 1980 opinion by timely filing a Petition For Writ Of Certiorari with the Alabama Supreme Court. The Petition was denied without an opinion.

IX. REASONS FOR GRANTING THE WRIT

This case involves two important questions for review by this Court. Both are fundamental to the rights of criminal defendants. The Supreme Court of Alabama's decision, which allows the Alabama Court of Criminal Appeals' June 30, 1980 opinion in this case to stand, conflicts with

rights previously recognized and mandated by this Court for accused persons in criminal proceedings. Certiorari should be granted so that this Court can review and correct the decision of the Alabama Supreme Court on the issues presented in this Petition.

A. The Validity of the Challenged Search Warrant

In his affidavit in support of the challenged search warrant, affiant Laing stated that "...I had a conversation with a confidential and reliable informant who has given me information in the past which has proven to be true and correct." During the first motion to suppress hearing, in the trial which ended in a mistrial, Laing answered questions to the effect that the informant had not previously given him information, and he had no personal knowledge of the informant's

credibility. During the second suppression hearing, Laing testified that his informant had given him information some five times in the past. The Alabama Court of Criminal Appeals acknowledged the inconsistent statements made by Laing, but side-steped this challenge to the validity of the search warrant by observing that "there were no objections taken to this matter either at the first suppression hearing, the second suppression hearing, at trial, or in the motion for new trial." The Court went on to conclude that "it is not subject to review" since "this issue has been raised for the first time on appeal." The Court stated that "[i]n the absence of the trial judge being apprised of the inconsistent prior testimony, his ruling was correct."

The undersigned counsel did not represent petitioner at his first suppression

hearing, and does not know why the inconsistency was not raised there. However, during the second motion hearing, the trial Court was not tolerant of any detailed examination of Laing regarding his affidavit because it had already decided the first suppression motion at the May, 1980 hearing and directed counsel to move on because the Court was "not going into things that have already been heard." (R. 31). The trial Court further stated, "I'm not going to give you any more than you have already been granted by previous hearing,...." (R. 31). The trial Judge restricted examination of Laing on questions relating to the reliability of the informant by stating to petitioner's counsel that the Court had already made a determination on this matter and the issue was closed. (R. 32).

Although the inconsistent statements were not expressly identified as a ground

in petitioner's motion for new trial, it was incorporated in ground number 10 therein. (R. 270-271). The motion was summarily denied.

Petitioner should not bear the brunt of the trial Judge's decision to foreclose the avenues available for apprising the Court of Laing's inconsistent prior testimony.

After noting that ex-police officer Laing had given inconsistent prior testimony under oath in this case, the Court of Criminal Appeals went on to test the sufficiency of Laing's affidavit which purports to show (a) the veracity of the informant and (b) the basis of the informant's knowledge. Petitioner had challenged the validity of the search warrant and affidavit under the Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969) decisions of this Court.

In concluding that the warrant and affidavit were sufficient, the Court of Appeals retreated from the stringent requirements of Spinelli and Aguilar. The Court's assessment of Laing's affidavit permits a knowledge base which is considerably weaker than the one struck down in Spinelli . Like wise, the Court's acceptance of Laing's general conclusory statements concerning the informant's veracity, when Laing's own veracity has been seriously undermined by his inconsistent prior statements, dilutes the strict requirements of Aguilar.

The Court acknowledged that affiant Laing answered questions during the May, 1979 hearing to the effect that the informant had not previously given him information, and he had no personal knowledge of the informant's credibility. Yet, the Court cited the excerpt from Laing's

affidavit stating "...I had a conversation with a confidential and reliable informant who has given me information in the past which has proven to be true and correct..." to satisfy the reliability requirement of the affidavit. This contradiction inflicts a substantial injustice upon petitioner that can only be remedied by a reversal of the conviction in this case so that the trial Court can properly assess the Aguilar and Spinelli requirements in light of the affiant's full testimony.

B. Disclosure of the Police Informant's Identity

Evidence presented at trial indicated that a suspected informant, Mr. Willie Hardin, had been at petitioner's residence the night prior to the search. (R. 173). The evidence also suggested that Mr. Hardin planted said drugs on the premises. No illegal substances were found on the

person of the petitioner. (R. 168).

The Appeals Court recognized that the State is compelled to disclose the informant's identity where (1) it appears the informer's name is necessary at the trial itself to show the accused's innocence or guilt and (2) the informant was an active participant in the crime. Roviaro v. United States, 352 U.S. 53 (1957).

Petitioner tried to elicit from Officer Wright the identity of the informant. The trial Court stopped petitioner's examination in this area. The Appeals Court said that the trial Judge was correct, and that the burden was on petitioner to show why the disclosure of the informant was necessary to show his innocence.

Petitioner discharged the burden placed on him when he developed his defense that one Willie Hardin was the informant and that Hardin planted the drugs in his residence. Petitioner had tried to get

Hardin to talk to his attorneys (R. 204), but this was not successful. Petitioner saw Hardin "in the street" several days prior to the trial, but was not able to secure an address on Hardin for subpoena purposes. (R. 204).

The Appeals Court distinguished appellant's case from that of Hatton v. State, 359 So.2d 822, cert. quashed, 359 So.2d 832 (1978), wherein it was reversible error to preclude inquiry as to the informer's identity, by the fact that the suspected informant in Hatton was called to the witness stand and Willie Hardin was not. The Court held that petitioner's failure to ask for compulsory process for Hardin constituted a waiver of his right to confront him under oath.

The Court overlooked the fact that Hardin evaded petitioner's counsel (R. 187, 204), and that petitioner was never able

to secure an address for Hardin. (R. 187, 204). Had officer Wright confirmed Hardin as the informant, the police could have supplied his address and he would have thereafter been subpoeaned by petitioner.

The distinction the Appeals Court made between Hatton and petitioner's case was artificial. The only difference between the two was that in Hatton the accused knew how to locate the informant whereas in petitioner's case the informant's whereabouts were unknown. The evasiveness of the informant should not be allowed to defeat petitioner's rights under Hatton or Roviaro.

X. CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court

of Alabama entered on December 2, 1980, denying petitioner's Writ of Certiorari filed in that Court which sought a review of the Alabama Court of Criminal Appeals' June 30, 1980 opinion affirming petitioner's conviction on drug charges.

Respectfully submitted,

WATKINS, CARTER & DANIEL

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CERTIFICATE OF SERVICE

I hereby certify that I have served the required number of copies of the foregoing Petition For Writ of Certiorari and Appendices attached hereto upon the following persons by placing same in the United

States Mail, postage prepaid, on this

28th day of January, 1981:

Honorable Charles Graddick
Attorney General
State of Alabama
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Honorable Mollie Jordan, Clerk
Alabama Court of Criminal Appeals
Judicial Building
Montgomery, Alabama 36104

Honorable J. O. Sentell, Clerk
Alabama Supreme Court
Post Office Box 157
Montgomery, Alabama 36101

Donald V. Watkins

No._____

IN THE
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OCTOBER TERM, 1980

HAROLD THORNTON,

Petitioner,

V.

STATE OF ALABAMA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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App. A

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

December 2, 1980

Re: 79-841
EX PARTE: HAROLD THORNTON
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

(Re: Harold Thornton vs.
Appellant

State of Alabama)
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Petition for Writ of Certiorari denied. No opinion. Faulkner, J. - TOLBERT, C.J., ALMON, EMBRY AND ADAMS, JJ., CONCUR

/s/ J. O. Sentell
Clerk, Supreme Court of
Alabama

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

3 Div. 135

Harold Thornton

v

State

Appeal from Montgomery Circuit Court

BOOKOUT, JUDGE

Possession of controlled substances (Heroin, cocaine, and codeine); sentence: ten years imprisonment and $25,000 fine.

On December 2, 1978, at approximately 7:00 a.m., Montgomery Police Officer J. G. Laing, along with several members of the Montgomery Police Department's narcotics detail and two Montgomery County deputy sheriffs, executed a search warrant on the residence of the appellant at 455-A

Lanier Court, Montgomery, Alabama. The drugs for which appellant was convicted were discovered in plain view on top of a dresser in his bedroom and on top of a table in his dining room. The appellant was placed under arrest at his residence upon discovery of the drugs.

The only issues on this appeal concern the affidavit supporting the search warrant. The affidavit is in pertinent part as follows:

> "Before me, the Honorable Mathis W. Piel, Judge of the Municipal Court of the City of Montgomery, Montgomery County, Alabama, the undersigned being first duly sworn deposes and says:
>
> "That he is a police officer in and for the City of Montgomery, Montgomery, Alabama, and that he has reason to believe, probable cause to believe, and, in fact, does believe, that marijuana, a controlled substance, or any compound, mixture or substance containing marijuana, or heroin, cocaine or dilaudid is being kept, stored and concealed in the residence located at 455 'A' Lanier Court, Montgo-

mery, Alabama. This is violation of the Alabama Uniform Controlled Substances Act of 1971.

And the facts tending to establish the foregoing grounds for issuance of a daytime search warrant are as follows:

On November 29, 1978, I had a conversation with a confidential and reliable informant who has given me information in the past which has proven to be true and correct. Informant has also furnished information in the past to Sergeant E. B. Alford of the Montgomery Police Department as well as Sergeant T. Hudman which has proven to be true and correct and has led to warrants and correct identification of a subject by the name of R. T. Fuller who robbed the Thoni Gas Station located at 4232 Mobile Highway during the past year. Said informant informed me that within the past twelve hours informant, hereinafter known as 'A", was present at the residence located at 455 'A' Lanier Court, Montgomery Alabama, at which Harold Thornton resides and at that time observed quantities of heroin and cocaine being cut for distribution. 'A' further stated that there was [sic] quantities of dilaudid at that residence.

> "Based on the above information, I have probable cause to believe, and do believe, there is presently located at 455 'A' Lanier Court, Montgomery, Alabama, where Harold Thornton resides, a quantity of marijuana, cocaine, heroin and dilaudid, all of which are controlled substances."

A pretrial motion to quash the search warrant and suppress the evidence was filed by the appellant's counsel and denied after a suppression hearing. After commencement of the trial, a mistrial was declared. Different attorneys entered the case for appellant and filed a motion to "controvert" the search warrant, suppress the evidence, and disclose the informant. Another suppression hearing was held on the second trial. That motion was denied, trial commenced, and the appellant was convicted.

I

The appellant contends the search warrant should have been suppressed and

the evidence excluded because of inconsistent statements made by the affiant, Officer Laing, at the two suppression hearings concerning the affidavit in support of the search warrant.

On the second suppression hearing on June 15, 1979, Officer Laing testified that his informant had given him information some five different times in the past. From Laing's personal knowledge of facts within his division of the police department, such information had resulted in one arrest and one conviction. The informant's information had resulted in other arrests, but concerned matters in other divisions, and Laing could not say whether or not convictions were obtained.

Appellant contends that Laing's testimony was different at the first suppression hearing on May 14. 1979, in the first trial which ended in a mistrial.

On that occasion Laing answered questions to the effect that the informant had not previously given him information, and he had no personal knowledge of the informant's credibility. A transcript of that first suppression hearing is included in the record even though it was part of the proceedings of a trial that resulted in a mistrial and is not a part of the second trial which is the subject of this appeal.

Appeals lie only from judgments of conviction, and then only on those counts upon which there is a finding of guilt. Section 12-22-130, Code of Ala. 1975. Stringer v. State, Ala. Cr. App., 372 So. 2d 378 (1979), cert. denied, Ala., 372 So.2d 384; Hammond v. State, Ala.Cr.App., 354 So.2d 280 (1977), cert. denied, Ala., 354 So.2d 294; Forrest v. State, Ala.Cr. App., 344 So.2d 231 (1977). The appellant therefore cannot challenge the ruling of the trial judge on a motion filed in a

prior proceeding which did not result in a judgment of conviction.

The record in the instant case certainly reveals that Officer Laing made inconsistent statements in the two suppression hearings; however, at no time during the second hearing did the appellant raise that inconsistency. He did not call it to the attention of the trial judge. He did not cross-examine Laing concerning the inconsistency. His sole effort on that occasion was to attempt to disclose the identity of the informant. Officer Laing's testimony on the second hearing was sufficient to support the credibility of his informant. In the absence of the trial judge being apprised of the inconsistent prior testimony, his ruling was correct.

There were no objections taken to this matter either at the first suppression hearing, the second suppression

hearing, at trial, or in the motion for new trial. Since this issue has been raised for the first time on appeal, it is not subject to review. Slinker v. State, Ala.Cr.App., 344 So.2d 1264 (1977).

II

The appellant contends the affidavit supporting the search warrant did not sufficiently meet the requirements of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), to support a finding of probable cause to search his residence. The appellant specifically alleges that there was no showing the informant was reliable and that the alleged criminal activity of the appellant was not described in sufficient detail.

Aguilar requires that an affidavit based on hearsay information must inform a magistrate of underlying circumstances sufficient to satisfy him of (a) the veracity of the informant and (b) the basis of the informant's knowledge. In addition, the underlying circumstances must be in sufficient detail so as to inform the magistrate that the information he is relying on in the affidavit is "something more substantial than a casual rumor." Spinelli, 393 U.S. at 416.

Veracity

The following assertion of Officer Laing was used in the affidavit in this case: "On November 29, 1978, I had a conversation with a confidential and reliagle informant who has given me information in the past which has proven to be true and correct." The Alabama Supreme Court has approved the use of the assertion,

"I have received information from a person whose record of reliability for correctness has been good," as sufficient to support the veracity requirement of Aguilar. Neugent v. State, Ala., 340 So.2d 52, 53, cert. denied, 430 U.S. 969 (1977); Davis v. State, 286 Ala. 117, 237 So.2d 640 (1970). The above two assertions are essentially the same assertions worded differently. In fact, we believe the assertion in this case to be the stronger of the two. To further support the reliability of the informant, the affiant goes on to state that the informant had previously furnished information to two other police officers that "led to warrants and correct identification" concerning a specific robbery. This court in Keller v. State, 54 Ala.App. 127, 305 So.2d 402 (1974), held that an affiant's assertion that prior information given by an infor-

mant led to arrests was a sufficient factual basis to determine the informant's credibility. "[A]n informer need not be shown to be reliable any particular number of times" before the reliability requirement of an affidavit supporting a search warrant is met. Moore v. State, Ala.Cr. App., 340 So.2d 882, 884, cert. denied, Ala., 340 So.2d 885 (1976).

Basis

The appellant claims the following assertion in the affidavit fails to meet the basis of knowledge requirement of Aguilar: "Said informant informed me that within the past twelve hours informant, hereinafter known as 'A', was present at the residence located at 455 'A' Lanier Court, Montgomery, Alabama, at which Harold Thornton resides and at that time observed quantities of heroin and cocaine being cut up for distribution. 'A' further

stated that there was [sic] quantities of dilaudid at that residence." It is clear to this court that the personal observation of illegal drugs at a defendant's residence is not a mere casual rumor. Spinelli, supra.

We conclude that Officer Laing's affidavit was sufficient on its face to support the issuance of a search warrant.

III

The appellant's last contention of error concerns whether the trial court correctly denied his pretrial motion and attempt at trial to disclose the informant's identity. He claims that without the disclosure and the opportunity to confront the informant under oath, he was "effectively denied 'a fair determination of his [guilt] or innocence.'"

This court in Davis v. State, 46 Ala. App. 45, 237 So.2d 635, 638, affirmed,

286 Ala. 117, 237 So.2d 640 (1970), stated:

> "In Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887, it is fairly well established that the prosecution is entitled to withhold the identity of the informant for at least two reasons: (1) to foster its activities in detecting crimes by keeping open lines of communication with the underworld and (2) to protect informers from harm or reprisal."

An exception to this privilege is stated in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). This exception arises where (1) it appears the informer's name is necessary at trial itself to show the accused's innocence or guilt and (2) the informant was an active participant in the crime. However, this exception does not arise at a suppression hearing on the question of probable cause for the issuance of a search warrant where there is ample evidence that the officer relied "in good faith upon credible

information supplied by a reliable informent." McCray v. Illinois, 386 U.S. 300, 305, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); Kenny v. State, 51 Ala.App. 35, 282 So.2d 387, cert. denied, 291 Ala. 786, 282 So. 2d 392 (1973). In this case the appellant relied strictly on the issue of probable cause in his pretrial motion to disclose the informant's identity and also at the suppression hearing; therefore, he has not fallen within the Roviaro exception.

During the trial of this case, the trial court denied the appellant's attorney the opportunity to elicit from Montgomery Police Officer William F. Wright the identity of the informant. A hearing was held out of the presence of the jury wherein the appellant's attorney contended that one Willie Hardin planted the drugs found in the appellant's residence. We believe the trial court correctly followed the law in Roviaro and McCray in denying the answer

to the question:

> "COURT: Okay. The only circumstances that I know of wherein the informant's identity must be disclosed by the prosecution is where the informer was a witness or participated in the transaction which serves as the basis of the prosecution. We have possession here. I just do not think that the identity of the informant is vital to the defense in this case. Now, I'm not going to allow the witness to answer the question as to who the informer was. We're talking about possession. We're not talking about sale."

The informer in this case merely supplied information to the law enforcement officer to establish probable cause for a search of the appellant's residence. See: Dixon v. State, 39 Ala.App. 575, 105 So. 2d 354 (1958). The burden was on the accused to show why the disclosure of the informant was necessary to show his innocence. Hatton v. State, Ala.Cr.App., 359 So.2d 822, cert. quashed, Ala., 359 So.2d 832 (1978). The appellant, through his own

testimony before the jury, was allowed to develop his defense that he thought Willie Hardin was the informant and that Willie Hardin planted the drugs in his residence. The appellant testified that he saw Willie Hardin often, and he had last seen him five days before this trial. He had also told his attorneys about Willie Hardin. The similarity between this case and Hatton ends there.

The appellant's contention that he was denied the right to confront Willie Hardin (the alleged informant) under oath has no merit. In Hatton the suspected informant was actually called as a witness, but the trial court restricted his testimony. However, in the instant case, the appellant failed to ask for compulsory process for the witness. The failure to ask for compulsory process is a waiver of it. Alabama Constitution 1901, Article I,

§ 6; Ex parte Craft, 41 Ala.App. 519, 138 So.2d 226 (1962).

AFFIRMED.

All the Judges concur.